

IN DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2019-CV-

COMPLAINT

Page 1 of 5

management and operation of the K-Mart Store located in Bismarck, North Dakota during June of 2017.

[¶ 6.] Whenever and wherever reference is made in this Complaint to any conduct of the Defendants, or any of them, such allegations or references shall also be deemed to mean and include the conduct of each Defendant, acting individually, jointly and severally.

[¶ 7.] The Court has jurisdiction over this matter by virtue of the fact that Plaintiff is a resident of Burleigh County, North Dakota and further by virtue of the fact that the injury sustained by Plaintiff, as alleged herein, occurred at the K-Mart Store located in the City of Bismarck, Burleigh County, North Dakota.

[¶ 8.] During June of 2017, and specifically on June 7, 2017, the Defendant owned, possessed, controlled, maintained and managed the K-Mart Store located at 2625 State Street, Bismarck, North Dakota 58503.

[¶ 9.] On information and belief, the K-Mart Store located in Bismarck, North Dakota is identified as "KMART Bismarck #4272".

[¶ 10.] On June 7, 2017, Plaintiff Vivian Hilken was shopping in the Bismarck Kmart Store, walking down the aisles of store while pushing a cart, when she tripped on a packaging band strap that had been partially removed a merchandise box resting in the aisle. The band formed a loop which caught the Plaintiff's foot and caused Plaintiff to fall.

[¶ 11.] As a result of Plaintiff's fall at the Bismarck Kmart Store, Plaintiff suffered a fracture to her femur at or about her hip joint.

[¶ 12.] The treatment and repair of Plaintiff's fracture femur required the surgical insertion of a rod and pin into the Plaintiff's femur.

[¶ 13.] Subsequently, because Plaintiff continued to suffer from pain at the site of the fracture, a second surgical procedure was implemented to remove the hardware surgically installed in Plaintiff's femur.

[¶ 14.] Although the surgical hardware has been removed from the Plaintiff's hip, Plaintiff continues to suffer from pain and discomfort in the area of her fractured hip, which pain is likely to be permanent in nature.

[¶ 15.] During June of 2017, and specifically on June 7, 2017, it was the duty of the Defendants, and each and all of them, by and through its duly authorized agents and

employees, to exercise all due and necessary care and caution for the safety of Plaintiff and other members of the public on the Kmart premises.

[¶ 16.] On the date of the June 7, 2017 accident, the Defendants, and each and all of them, breached their duties and did not use due care and were negligent and careless causing the aisle in the Bismarck Kmart Store to be unsafe for customers, including Plaintiff, using said aisle.

[¶ 17.] On June 7, 2017, the Defendants, and each and all of them, were negligent in the following respects:

- a. Carelessly and negligently failing to provide and insure a reasonable and safe premises for the Plaintiff;
- b. Carelessly and negligently failing to maintain the aisle and walkway in which Plaintiff was walking at the time of the accident in a good and safe condition;
- c. Carelessly and negligently permitting a loose packaging band to be present on the floor in the aisle where Plaintiff was traversing;
- d. Carelessly and negligently failing to remove the packaging band from the box upon which it was installed after the Defendants knew or should have known of the existence of such band and the danger it presented to its customers, including Vivian Hilken;
- e. Carelessly and negligently failing to maintain the Kmart Store in Bismarck, North Dakota, and specifically the aisle in which Plaintiff tripped, in a good and safe condition;
- f. Carelessly and negligently failing to exercise the degree of care required under the circumstances.

[¶ 18.] As a direct and proximate result of the negligence of the Defendants herein, and each and all of them, by and through its duly authorized agents and employees, the Plaintiff tripped on a loose packaging binding strap at the Bismarck Kmart Store and suffered injuries, including a fractured femur, which resulted in severe pain and suffering, the accrual of medical expenses, lost wages and probable future pain, inconvenience, embarrassment and mental anguish, deprive Plaintiff of her ordinary pleasures of life and

well being, without any negligence on the part of Plaintiff contributing to her injuries or her damages.

[¶ 19.] As a result of the negligence of the Defendants, Plaintiff has accrued medical expenses in excess of \$50,000, with the precise sum of such damages to be established at the trial of this matter. As a result of the negligence of the Defendants, the Plaintiff has lost wages in the approximately sum of \$20,000, which sum will be established at the trial of this matter.

[¶ 20.] WHEREFORE, Plaintiff demands judgment against the Defendants, and each and all of them, as follows:

[¶ 21.] For a monetary judgment in a sum of \$20,000, or such other sum as proved at the trial of this matter, for lost past and future wages.

[¶ 22.] For Plaintiff's medical expenses accrued to date and for future medical expenses accrued by the Plaintiff, in a sum which will exceed \$50,000 and which sum will be proved at the trial of this matter.

[¶ 23.] For a monetary judgment in a sum which will exceed \$50,000 as and for Plaintiff's past and future pain and suffering, scarring, inconvenience, embarrassment and mental anguish.

[¶ 24.] For Plaintiff's costs and disbursement herein, including reasonable actual attorney fees.

[¶ 25.] For such other sums that the Court deems just and equitable under the circumstances.

[¶ 26.] Plaintiff acknowledges that the Defendants have filed for protection pursuant to Chapter 11 of the United States Bankruptcy Code. It is Plaintiff's understanding that the Plaintiff's losses are covered by the liability insurance policy wherein Sedgwick Insurance, Lexington, Kentucky, is the insurer and Kmart Corporation is the insured. Plaintiff agrees that Plaintiff's recovery shall be limited to insurance benefits available by virtue of such Sedgwick liability policy. Plaintiff will not seek to collect any sums directly from the Defendants as long as such Defendants are and remain under the jurisdiction of the Bankruptcy Court and will not seek collection from the Defendants, or any of them, in the event a Bankruptcy discharge is granted.

Dated at Bismarck, North Dakota, this _____ day of _____, 2019.

TSCHIDER & SMITH

BY:

David A. Tschider
Attorney for Plaintiff
I.D. # 04224
dtschider@tschider-smithlaw.com
418 East Rosser Avenue
Bismarck, North Dakota 58501

h:\david\goldhammer\goldh\david\hilken\hilken.kmart.complaint.docx